NG SEE CHONG v. TAN LAI MENG & ORS

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL SUIT NO: AA-22NCVC-62-04-2016]
17 MARCH 2017

DAMAGES: *Assessment – Appropriate basis of assessment – Loss of property – Damages for loss of property – Whether damages awarded for loss of property should be value of property at date tort was committed – Whether damages should be assessed on basis of value of property as at date of judgment*

TORT: *Damages – Assessment – Loss of property – Damages for loss of property – Whether damages awarded for loss of property should be value of property at date tort was committed – Whether damages should be assessed on basis of value of property as at date of judgment*

The plaintiff was the registered and beneficial owner of a property. Pursuant to a land search, the plaintiff discovered that the property had been transferred to the first defendant who subsequently sold and transferred it to the second defendant. The property was sold and transferred by the second defendant to the third and fourth defendants who then charged the same to the fifth defendant as a security for a loan. The plaintiff commenced this action to recover his property and for damages against the second to the fifth defendants and the Pentadbir Hak Milik Negeri Perak, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak (the sixth, seventh and eight defendants, respectively). According to the plaintiff, (i) the original computerised document of title was at all times in his possession; (ii) the transfer of the property to the first defendant was done without his knowledge and consent; and (iii) the sixth, seventh and eighth defendants were negligent in registering the transfer of the property to the first defendant. The parties came to an amicable settlement and pursuant to a consent order, the sixth to eighth defendants agreed to compensate the plaintiff for the loss of his property. The sixth to eighth defendants submitted that the damages awarded to the plaintiff for the loss of the property should be the value of the property at the date the tort was committed; this would be the date when the plaintiff was deprived of his property. However, the plaintiff contended that the plaintiff's loss should be assessed on the basis of the value of the property as at the date of the judgment.

Held (assessing damages as at date of judgment):

(1) In support of their argument, the sixth to eight defendants placed reliance on the decision of the Court of Appeal in *Tan Goat Eng & Anor v Rozdenil Toni (as Administrator of Estates of Toni Ismail & Normy Mohamed Khatif; Deceased)* ('*Tan Goat Eng*'). However, there was nothing

A in *Tan Goat Eng* that lends support to the position taken that damages for loss of real property must be assessed at the date when the tort was committed. In *Tan Goat Eng*, it was clear that the Court of Appeal directed that damages be assessed as at the date the tort was committed based on the circumstances of the case. (paras 5 & 13)

B **(2)** The decision in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam*, which was referred by the plaintiff, illustrated that the rule that damages for tort or breach of contract are assessed as at the date of the breach is only a general rule and is subject to many exceptions. It is flexible and can be departed from in order to give adequate compensation for the wrong C done to the plaintiff. The court should not mechanically apply this rule in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule. Hence, where it is necessary in order adequately to compensate the plaintiff for the damages suffered by reason of the defendant's wrong, a different date of assessment could D be selected. (paras 6 & 14)

(3) In the law of contract, the date of breach rule is not a strict and inflexible rule. The court has the power to fix such other date if to follow it would give rise to injustice. The plaintiff brought this action as soon as he was able to do so upon discovering the fraud. The task of the court was to E put the plaintiff into as good as position financially as he would have been if the property had not been fraudulently transferred to the first defendant. It could not be gainsaid that the plaintiff would, at the date of judgment, still have ownership of the property if the transfer of the property to the first defendant had not been registered by the sixth to F eighth defendants. The plaintiff was precluded from seeking to recover the property in this case as it was sold off to *bona fide* purchasers for value. In the circumstances, the plaintiff who was deprived of his property was entitled to claim as his loss was the value of the land as at the date of the judgment. (paras 18 & 19)

G **Case(s) referred to:**

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1985] 1 LNS 157 PC ***(refd)***

Dodd Properties (Kent) Ltd and Another v. Canterbury City Council And Others [1980] 1 All ER 928 ***(refd)***

Johnson v. Agnew [1980] AC 367 ***(refd)***

Livingstone v. Rawyards Coal Co (1880) 5 App Cas 25 ***(refd)***

H *Miliangos v. George Frank (Textiles) Ltd [1975] 3 All ER 801* ***(refd)***

Tan Goat Eng & Anor v. Rozdenil Toni (As Administrator Of Estates Of Toni Ismail & Normy Mohamed Khatif; Deceased) [2015] 6 CLJ 486 CA ***(dist)***

For the plaintiff - Gunasegaran Suppiah & Nanda Kumar PS Suppiah; M/s AM Ong & Partners

I *Rashpal Singh Khajan Singh; M/s Rashpal Singh & Co*

For the 1st defendant - No appearance entered

For the 2nd defendant - Iruthaya Raj, A; M/s Raj Selva & Co

For the 3rd & 4th defendants - Norazali Nordin; M/s Maxwell Kenion Cowdy & Jones
For the 5th defendant - Lim Ta Wai; M/s Khong & Son
For the 6th to 8th defendants - Suhaila Haron; Assistant State Legal Advisor

Reported by Najib Tamby

JUDGMENT

SM Komathy JC:

[1] The core issue in these proceedings for breach of tortuous duty is whether the court has the power to order that damages should be assessed as from the date of judgment instead of the date the tort was committed.

[2] The brief facts are that the plaintiff was the registered and beneficial owner of all the land held under Geran 3128, Lot 45795 Mukim Hulu Kinta together with a residential house erected thereon known as No. 14, Jalan Johore, Taman Canning 31400, Ipoh Perak ("the property"). On 1 November 2013, pursuant to a land search on the property, the plaintiff discovered that the property had been transferred to the first defendant, who had subsequently sold and transferred it to the second defendant on 2010. Thereafter, the property was sold and transferred by the second defendant to the third and fourth defendants, who had then charged the same to the fifth defendant as a security for a loan taken by them. The sixth to the eighth defendants were the Pentadbir Hakmilik Negeri Perak, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak.

[3] The plaintiff brought this action against the defendants to recover his property and for damages. It was averred in the statement of claim that the original computerised document of title was at all material times in his possession and that the transfer of the property to the first defendant was done without his knowledge and consent. It was further averred that the sixth, seventh and eighth defendants were negligent in registering the transfer of the property to the first defendant. The issue document of title that was used to transfer the property to the first to fourth defendants was a subsequent computerised version of the issue document of title which had been issued by the sixth to the eighth defendants to an unknown person.

[4] On 15 December 2016, the parties came to an amicable settlement, and pursuant to a consent order, the sixth to the eighth defendants agreed to compensate the plaintiff for the loss of his property without any admission of liability.

[5] The essence of the submission of the Senior Federal Counsel was that the damages awarded to the plaintiff for the loss of the property should be the value of the property at the date the tort was committed. This would be, she argued the date when the plaintiff was deprived of his property, namely the date the transfer was registered to the first defendant. It was common ground that transfer was registered on 12 August 2009. In support of this

A argument, reliance was placed on the decision of the Court of Appeal in *Tan Goat Eng & Anor v. Rozdenil Toni (As Administrator Of Estates Of Toni Ismail & Normy Mohamed Khatif; Deceased)* [2015] 6 CLJ 486 ("*Tan Goat Eng*").

B **[6]** Against this argument, counsel for the plaintiff contended that the plaintiff's loss should be assessed on the basis of the value of the property as at the date of judgment and not the date the plaintiff was deprived of it. He founded his argument on the decision of the Privy Council in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1985] 1 LNS 157; [1986] 1 MLJ 105 ("*Datuk Jagindar Singh*").

C **[7]** Before I turn to the rival submissions, I propose to set out some general principles to be applied in assessing damages. The fundamental principles to be applied in the assessment of damages were formulated by Lord Blackburn in *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25, 39:

D > that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[8] The general rule is that damages for tort or breach of contract are E assessed as at the date of the breach. The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract.

F **[9]** In turn now to examine the two cases cited by the parties in some detail. In the case of *Datuk Jagindar Singh*, the respondent had agreed to transfer her land at Kulai to the second appellant as security for an advance of $220,000 to the respondent on her account. The money was to be used to pay off a charge on the land and to pay the first appellant an amount payable G by the brother-in-law of the respondent for whom the first appellant had stood surety in securing an advance from a bank. The first and second appellants were advocates and solicitors who acted for the respondent in preparing the necessary documents. The transfer and memorandum in favour of the second appellant were signed on 30 March 1974, and the transfer was registered on 22 July 1975. On 31 July 1975 the second appellant executed H a transfer of the land in favour of the third appellant purportedly in consideration of $220,000 but no consideration in fact passed. Subsequently, the land was again transferred to a land development company almost wholly-owned by the first appellant. The land was eventually subdivided and sold to the public. The plaintiff then brought an action to recover her land. I On 21 November 1982 the trial judge found the first and second appellants were guilty of fraud and awarded a sum of RM973,000 as damages. The sum of $370,260 was arrived at as being an estimate of the value of the Kulai land in July 1975, when the transfer to the second appellant was dated and

registered. To this sum, the learned trial judge added $518,364 as being a figure arrived at on the basis that property values generally had appreciated at the rate of 20% per annum over the period from 1975 to 1982, a total increase of 140% over the period. He further added a sum of $84,000 as being the value of the dwelling house situated on the property as at July 1975. The aggregate of these three sums was $972,624 which was rounded off at $973,000.

[10] The appellants appealed to the Privy Council after the Federal Court dismissed their appeal. The Privy Council dismissed the appeal on liability but reduced damages from $973,000 to $797,000. In explaining the reduction, Lord Keith of Kinkel in delivering the judgment of the Privy Council said:

> Then it was maintained that the learned trial judge erred in adding to the value which he placed upon the land as at 1975 the value of the dwelling house situated thereon. In their Lordships' opinion there is substance in this contention. The figure of $370,260 was arrived at upon the basis of the price which the land would fetch in the market if sold for development purposes. The existing use value would necessarily have been lower. Development of land would have involved demolition of the dwelling house. Therefore a purchaser who intended to develop the land would have added nothing to the price he was willing to pay in respect of its presence on the land. There is, accordingly, no tenable ground for adding to the value on the basis of a sale for development any element in respect of the dwelling house.
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> It was next contended that credit should have been given to the amount of $202,000 representing the $92,000 paid by the first appellant to the CK Bank in discharge of Devan's overdraft and $110,000 of the $121,819.80 paid by him to the HKS Bank in discharge of Dr Das's overdraft. As regards the $92,000, it is to be observed that the overdrawn account was in the name of Devan, not that of the respondent. It appears to their Lordships nevertheless to be right to treat the discharge of the overdraft as being a benefit to the respondent which reduced to that extent the damage suffered by her as a result of the tort committed against her. This is particularly so when it is kept in mind that Devan had a certain beneficial interest in the land and that the respondent is claiming redress for the tort in her own name alone. Further, the overdraft was secured upon the land so as to be a charge upon the respondent's beneficial interest in it. Their Lordships are therefore of opinion that a deduction should be made in respect of the sum of $92,000. ...
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> It was further argued for these appellants that Abdul Razak J. was wrong to include in the damages any sum in respect of the increment in value which he held would have accrued to the land, had the appellant not been wrongfully deprived of it, between the date of the deprivation and the date of judgment, and in any event that the increment of 140% had no evidential basis and was unjustified. *No doubt it is a general rule of law that the damages recoverable for a tort are to be assessed as at the date the tort was committed. But there are many exceptions to that rule, the most notable perhaps being the case of damages for personal injuries caused by negligence, which are assessed*

so as to take into account all loss suffered up to the date of trial having regard to the value of money at that time. The true test is what is just and reasonable in all the circumstances. The object of damages for the tort of deceit, as for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not been committed. In the present case there is no reason to doubt that if the respondent had not been tricked out of her land she would at the date of judgment still have been in ownership and possession of it bearing the value which in ordinary course it would have borne at that time. Further, if these appellants had not succeeded in bringing it about that the land was sub-divided into 70 lots and sold off to *bona fide* purchasers for value, the respondent would have been entitled to have the transaction with her set aside and to recover the land itself on the date that judgment was pronounced. So in their Lordships' opinion the learned trial judge was right in principle to take into account in the assessment of damages the value which the land, if the respondent had not been deprived of it, would have borne at the date of judgment. Special considerations might have arisen if the respondent had been guilty of unreasonable delay in prosecuting her claim, but no suggestion of that has been made.

It remains to consider whether Abdul Razak J. was entitled to find, as he did, that an increment in value of 140% would have accrued to the land between 1975 and 1982. The only relevant piece of evidence before him was a statement by the respondent's expert witness Chong that there had been a boom in property values during a period up to about 1979. The learned judge, however, expressed himself as proceeding on the view that it had become a matter of public and common knowledge that even if there had been no boom the normal annual rate of increase of land prices had always been generally about 20% a year. He said that this had been confirmed by about 700 land reference cases which had come before him over the past 11 months or so throughout Western Malaysia. The Federal Court did not criticise his approach, nor indeed advert to it at all. There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary quite widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge. As to whether or not it is so in Malaysia is a question upon which their Lordships would hesitate to venture an opinion. The judiciary of Malaysia are the persons best qualified to answer the question. The learned trial judge has found the particular matter to be common and public knowledge there, and his finding has not been criticised by the Federal Court. Their Lordships are not prepared to interfere with that finding and accordingly reject the appellants' argument.

Finally, it was maintained for the appellants that Abdul Razak J. erred in allowing interest at 6% from July 1975 upon the sum representing the then value of the land, in addition to the 140% increment in value, because by

doing so he had in substance compensated the respondent twice over for the same element of loss. In their Lordships' opinion there has been no double compensation. The 140% increment compensates the respondent for the capital loss she has sustained through not having the ownership of the land at the date of judgment, whereas the 6% interest compensates her for not having had possession of the land, and thus enjoyment of its fruits, during the intervening period. In the result, the respondent and her family had to live in rented accommodation, with consequent expense, during that period, and it is fair that this should be the subject of compensation. It is the case, however, that the respondent was not dispossessed of the land until September 20, 1976, and it is from that date, not July 1975, that the interest should run.

(emphasis added)

[11] In *Tan Goat Eng*, the case relied on by the sixth to eight defendants, the facts were these. The plaintiff was the administrator of the estates of his parents. Their estate included a piece of land. The plaintiff's brother, the second defendant, wrongfully sold and transferred the land to the third and fourth defendants by using a forged instrument. The plaintiff only discovered the transfer of the property by the use of a forged document after it had changed hands from the third and fourth defendants to the other defendants. He then brought an action for the retransfer of the property. The trial court did not set aside the transaction but ordered the third and fourth defendants to pay damages. The trial judge awarded as damages the value of property as at the date of judgment ie, 3 July 2014.

[12] On appeal, the Court of Appeal affirmed the decision of the High Court but amended the date stipulated by the learned judge for the assessment of damages from the date of the judgment to the date ie, 3 July 2014 to the date of the property was transferred by the plaintiff's brother to the third and fourth defendants by the use of a false power of attorney ie, 17 July 2008. The Court of Appeal held that the date the tort was committed more accurately reflected the basis for and estimation of loss to be computed in light of the circumstances.

[13] Having read the judgment of the Court of Appeal, I find nothing in it that lends support to the position taken by the Senior Federal Counsel that damages for loss of real property must be assessed at the date when the tort was committed. In that case, it is clear from para. 24 of the judgment of the Court of Appeal that it directed that damages be assessed as at the date the tort was committed based on the circumstances in that case.

[14] The decision in *Datuk Jagindar Singh* illustrates that the rule that damages for tort or breach of contract are assessed as at the date of the breach is only a general rule and is subject to many exceptions. It is flexible and can be departed from in order to give adequate compensation for the wrong done to the plaintiff. The court should not mechanically apply this rule in

A circumstances where assessment at another date may more accurately reflect the overriding compensatory rule. Hence, where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong, a different date of assessment can be selected.

B **[15]** The general rule was not applied in the assessment of damages in *Miliangos v. George Frank (Textiles) Ltd* [1975] 3 All ER 801 and *Dodd Properties (Kent) Ltd and Another v. Canterbury City Council And Others* [1980] 1 All ER 928 ("*Dodd Properties*").

C **[16]** In the latter case, *Dodd Properties*, the facts of this case may be taken from the headnotes. The plaintiffs were respectively the owners and lessees of a building in which the second plaintiff operated a garage and car sales business. In 1968, a multi-storey car park was erected next door to the plaintiffs' building. The defendants were the contractors for the construction of the car park and the sub-contractors for its foundations. As a result of pile-driving operations for the foundations, serious structural damage was D caused to the plaintiffs' building. The plaintiffs brought an action against the defendants in negligence and/or nuisance. The first plaintiff claimed damages for the cost of repairs to the building and the second plaintiff claimed damages for losses arising out of the prospective interruption to their business if and when the repairs were carried out. Liability was at first denied by the E defendants but was admitted shortly before the hearing of the action in 1978, but the issue of quantum remained contested. The first plaintiff had not carried out any repairs at the date of hearing, claiming that to have done so in 1970 (which was the earliest date when it was physically possible to have carried out repairs) would have caused them a degree of financial stringency F and that in any event it would not have made commercial sense for them to have repaired the building before they were sure of recovering the expenditure from the defendants, because that expenditure was not going to produce a corresponding increase in income. The plaintiffs accordingly contended that the damages should be assessed as at the date of hearing, being G £30,327 for the cost of repairs and £11,951 for the disruption to the business. The defendants contended that the damages should be assessed as at 1970, being £11,375 for the repairs and £4,108 for the disruption. The judge held that the damages were to be assessed as at 1970 because that was the date when it was reasonable for the plaintiffs to have commenced carrying out the repairs. In so holding, the judge decided that any financial stringency caused H to the first plaintiff by carrying out the repairs in 1970 was an extrinsic factor and irrelevant. The plaintiffs appealed.

[17] In allowing the appeal, the Court of Appeal held that where a building was damaged by a tortious act and put in need of repair, the cost of repairs I was to be assessed according to the broad and fundamental principle regarding damages, namely that they were compensatory and should as far as possible put the injured party in the same position as if the wrong had not

been committed. Applying that principle, the cost of repairs was to be assessed at the earliest date when, having regard to all the circumstances, they could reasonably be undertaken, rather than the date when the damage occurred.

[18] Similarly, in the law of contract, the date of breach rule is not a strict and inflexible rule. The court has the power to fix such other date if to follow it would give rise to injustice. See *Johnson v. Agnew* [1980] AC 367.

[19] Reverting to the present case, the plaintiff was residing in Australia at the material time. He had inherited the property from his late father sometime in 1987. He had left for Australia in 1992 and came back to Malaysia occasionally to visit in mother who was living in Kuala Lumpur. He had brought this action as soon as he was able to do so upon discovering the fraud. The task of the court is to put the plaintiff into as good a position financially as he would have been if the property had not been fraudulently transferred to the first defendant. It cannot be gainsaid that the plaintiff would at the date of judgment still have ownership of the property if the transfer of the property to the first defendant had not been registered by the sixth to eighth defendants. The plaintiff is precluded from seeking to recover the property in this case as it has been sold off to *bona fide* purchasers for value. In the circumstances, the plaintiff who has been deprived of his property is entitled to claim as his loss the value of the land as at the date of judgment.

[20] In the circumstances, I assess the loss suffered by the plaintiff at RM600,000 based on the valuation reports submitted by the parties. It bears mention that even the valuation report produced by the sixth to eighth defendants only alluded to the value of the property as at the date of judgment.